86-1033

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SIDNEY L. JAFFE, MEADOW VALLEY RANCHOS INCORPORATED, RUBY MOUNTAIN CONSTRUCTION AND DEVELOPMENT CORPORATION, AND ATLANTIC COMMERCIAL DEVELOPMENT CORPORATION,

Petitioners,

v.

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORPORATION, and as Receiver,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE PRIVILEGE AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES MAY BE ASSERTED BY AN INDIVIDUAL IN RESPONSE TO REQUESTS FOR CORPORATE RECORDS WHERE HE IS THE ALTER EGO OF THE CORPORATION AND THERE ARE NO OTHER ACTIVE OFFICERS.

2. WHETHER THE PETITIONERS WERE DENIED DUE PROCESS AND IMPROPERLY PENALIZED FOR PETITIONER JAFFE'S ASSERTION OF HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

3. WHETHER THE DISPOSITION OF PETITIONERS' CLAIMS WAS A DEPARTURE FROM PROPER STANDARDS IN THE ADMINISTRATION OF JUSTICE WARRANTING THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

LIST OF PARTIES

All parties to the proceeding in the Court whose judgment is ought to be reviewed are:

SIDNEY L. JAFFE, MEADOW VALLEY RANCHOS INCORPORATED, RUBY MOUNTAIN CONSTRUCTION AND DEVELOPMENT CORPORATION, AND ATLANTIC COMMERICAL DEVELOPMENT CORPORATION,

Plaintiffs-Counterclaim Defendants-Appellants.

v.

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORPORATION, and as Receiver,

Defendant-Counterclaim Plaintiff-Appellee.

LISTING PURSUANT TO RULE 28.1

Atlantic Commerical Development Corporation is the parent company of Ruby Mountain Construction and Development Corporation.

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No.

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Reference to the Opinions Below

The opinion of the United States Court of Appeals for the Eleventh Circuit is officially reported at 793 F.2d 1182. The order of the United States Court of Appeals for the Eleventh Circuit dated September 26, 1986, denying Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc is officially reported at 803 F.2d 1185. The District Court's orders of October 2, 1984 and October 15, 1982 are not reported. The Eleventh Circuit's order on the Petition for Rehearing and Suggestion for Rehearing En Banc, the opinion of the Eleventh Circuit, and the orders of the District Court are set out in the Appendix at A-1, A-3, A-19, and A-32, respectively.

Statement of Grounds of Jurisdiction

(i) The judgment sought to be reviewed was entered on July 18, 1986.

(ii) Petitioners's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on September 26, 1986. This Petition is filed within ninety days of that denial.

(iii) Not applicable.

(iv) This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. §§ 1254(i) and 2101(c).

Constitutional Provision Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The jurisdiction of the District Court was originally invoked by petitioners when they filed their civil rights complaint against defendant Grant, et. al. pursuant to 28 U.S.C. § 1331 (jurisdiction in all civil actions arising under the Constitution or the laws of the United States). After petitioners' complaint was voluntarily dismissed, jurisdiction of the District Court for Grant's

counterclaim was invoked pursuant to 28 U.S.C. § 1332 (jurisdiction in all civil actions in which there exists diversity of citizenship).

(1) *The Events Preceding the Final Judgment Below*

Petitioner Meadow Valley Ranchos Incorporated ("Meadow Valley") is a Nevada corporation. Petitioner Ruby Mountain Construction and Development Corporation ("Ruby Mountain") is an Illinois corporation. Petitioner Atlantic Commercial Development Corporation ("Atlantic Commercial") is a Delaware corporation. Petitioner Sidney Jaffe was initially alleged and subsequently found to be the alter ego of the petitioner corporations. Jaffe was president of the three petitioner corporations and vice-president of Continental Southeast Land Corporation ("Continental").

In 1978, Continental was sued by a number of investors in Florida state court in *Raymond v. Continental Southeast Land Corporation* concerning land located in Putnam County, Florida which the investors had contracted to purchase from Continental. The *Raymond* complaint alleged that the real estate had been fraudulently conveyed to the petitioner corporations. Jaffe was not sued in that litigation.

On June 14, 1979, Continental commenced a separate action by filing a Chapter XI bankruptcy petition in the Northern District of California. Pursuant to that filing, the provisions of § 11-44(a) of the Bankruptcy Act automatically stayed the prosecution of all actions involving Continental. Thereafter, the case was transferred to the United States District Court for the Middle District of Florida, Continental was adjudicated bankrupt and in January, 1980 Grant was appointed trustee for Continental.

Despite the bankruptcy stay and corollary orders entered by the bankruptcy court, Judge Eastmoore proceeded with the *Raymond* action.[1] On June 18, 1979, Judge Eastmoore entered an

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[1] Judge Eastmoore became the presiding judge in the *Raymond* action on April 2, 1978 when the case was transferred to the Seventh Judicial Circuit Court of Putnam County, Florida. (Appellate Record ("Record") at 16, 64)

order appointing a receiver to marshall all assets of Continental. In March, 1980 he substituted the bankruptcy trustee, Grant, as a party defendant and realigned him as plaintiff.

After two years during which both civil actions had been pending, the State of Florida suddenly charged Jaffe in July 1980 with alleged violations of the Florida Land Sales Act in connection with the Continental real estate transactions. Although the Florida Fifth District Court of Appeals subsequently determined that the resulting informations did not charge an offense, Judge Eastmoore signed a warrant on July 7, 1980, and Jaffe was arrested that day after attending a hearing before the Florida bankruptcy court. (Record at 9)

Shortly thereafter, a settlement agreement was negotiated among Grant as trustee for Continental, Meadow Valley, Atlantic Commerical, and Ruby Mountain. The agreement was approved by the bankruptcy court on November 24, 1980. It provided for Atlantic Commercial to pay $350,000 to the bankrupt estate. Atlantic Commercial did pay $25,000 shortly after the agreement was approved, but a dispute over performance of the agreement ensued. Grant responded by seeking a default judgment in the *Raymond* state action against petitioners Meadow Valley, Atlantic Commercial, and Ruby Mountain.

On March 16, 1981, a default judgment was entered by the state court against the corporations due to their refusal to comply with certain discovery requests, the majority of which occurred subsequent to the entry of the bankruptcy court stay. The state court did not enter a judgment for money damages. Instead, it ordered the petitioner corporations to perform an accounting to determine how much money had been collected from individual contract vendees.

Petitioners Jaffe, Meadow Valley, Ruby Mountain, and Atlantic Commercial commenced the present litigation pursuant to 42 U.S.C. § 1983 on May 15, 1981, alleging a conspiracy among Grant, County Judge Eastmoore, state attorney Boyles, and former state court receiver Millican to prosecute criminally

Jaffe to force him to settle the *Raymond* action and thereby to violate his civil rights.

On July 15, 1981, Grant filed a motion to dismiss. On September 9, 1981 Grant filed an answer and counterclaim subject to the motion to dismiss. The answer and counterclaim asserted that Jaffe was the alter-ego for the three petitioner corporations and sought damages for the alleged breach of the settlement agreement and enforcement of the March 10, 1981 state court judgment ordering the corporations to perform an accounting.

When Grant filed his counterclaim, Jaffe was in Toronto, Ontario. In May, 1981, he had unsuccessfully sought a continuance of his criminal trial on the outstanding state charges for medical reasons and he did not appear.

Although the United States and Canada have an enforceable extradition treaty, 27 U.S.T. 983, Florida did not use it to obtain Jaffe's subsequent appearance in Florida. Instead, on September 23, 1981, Jaffe was kidnapped outside his home in Toronto, Ontario by Florida bounty hunters[2]. After being manacled and threatened, Jaffe was taken against his will to Florida where he was detained in the Putnam County jail and forcibly tried on the outstanding state criminal charges. Jaffe was convicted and on February 12, 1982 he was sentenced to 145 years in prison.

On February 11, 1982, petitioners had moved to dismiss their action against Grant pursuant to Fed. R. Civ. P. 41 and filed a voluntary dismissal with respect to the remaining defendants. This motion was granted in all respects on July 14, 1982 and the District Court dismissed both petitioners' complaint and Grant's counterclaim. On August 12, 1982, however, the District Court reversed itself and permitted Grant's counterclaim to be reinstated.

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[2] The bounty hunters were subsequently entradited to Canada *See Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983).

As set forth in greater detail below, Jaffe successfully appealed his 145 year sentence for criminal land sales convictions, although the Florida Fifth District Court of Appeals did not issue its opinion until September 2, 1983. In the interim, while Jaffe was confined in prison and prior to the voluntary dismissal, Grant actively prosecuted the counterclaim.

Jaffe's deposition was noticed and interrogatories and requests for the production of document were served on Jaffe as well as the petitioner corporations. Jaffe's ability to respond to these requests was complicated by the fact that he was imprisoned in Florida but records for the three corporations were located elsewhere. In addition, Jaffe subsequently advised the the Court that he had been hospitalized and had had disputes with his attorneys after they came into possession of the documents. Jaffe objected to all of the requested information and ultimately failed to respond completely to the discovery requests.

Grant repeatedly moved for the court to impose sanctions arguing that the asserted non-compliance, coupled with the actions of the corporations in the state court case, abused the discovery process. The District Court denied two sanction motions, but granted a third motion[3] on August 12, 1982 and set a hearing on October 8, 1982 to determine what sanctions to impose.

In the interim, Jaffe, although incarcerated, supervised an effort to reassemble documents that had been previously produced and sought to rectify the alleged defects in prior compliance with Grant's outstanding requests. This undertaking culminated with the provision of additional documents on October 7, 1982 and submissions to the Court updating responses to discovery and outlining discovery compliance. (Record at

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[3] Petitioners had not responded to this third sanction motion which was filed on May 27, 1982. As a result of a dispute, petitioners' then counsel moved to withdraw on April, 1982. The court neglected to grant a motion for substitution of new counsel until August 12, 1982, the same day that the sanction motion was granted. No other counsel appeared on their behalf and, accordingly, petitioners were effectively without counsel during the pendency of this third motion.

1526-89). Despite this efffort, the District Court, on October 15, 1982, struck petitioners' answer and affirmative defenses and entered a judgment by default on the question of liability against petitioners on Grant's counterclaim.

Grant thereafter moved on October 20, 1982 to enforce the state court judgment for $3,000,000 which had been entered on April 27, 1982, against Meadow Valley, Ruby Mountain, and Atlantic Commercial in the *Raymond* action. This money judgment did not exist and was not referred to in the counterclaim which Grant had originally filed on September 9, 1981. It did not even exist until seven months after that counterclaim had been filed. This *Raymond* money judgment also was based solely on a set of "deemed" admissions. Objections filed by the corporations to requests for admissions in the *Raymond* action had been rejected since they were filed by a law firm which had not yet been granted leave to appear on the corporations' behalf and because the objections were deemed to be non-responsive.

Grant also served new interrogatories and requests for production of documents in the present case in October 1982 and in January, and February of 1983. Although no final judgment had then been entered, the latter two requests were styled as discovery in aid of execution. The requests all sought information related to the finances of the petitioner corporations and petitioner Jaffe personally.

When petitioners objected to this discovery, Grant filed motions to compel on February 17, 1983 and March 11, 1983. The District Court had these motions and Grant's earlier motion to enforce the "supplemental" judgment under advice for more than one year until August 6, 1984. At that time the District Court denied Grant's motion to enter the "supplemental" judgment and referred the discovery motions to a magistrate.

While these motions were *sub judice* in the instant action, Jaffe was prosecuting the appeal of his state criminal conviction. On September 2, 1983, the Florida Fifth District Court of Appeals reversed Jaffe's conviction on land sales charges. It

held that no offense was charged and that, in any event, the proof at trial was insufficient to sustain the criminal allegations. The court, however, affirmed Jaffe's conviction for failure to appear at his scheduled trial.

The Florida state attorney apparently had anticipated the reversal of Jaffe's criminal convictions and filed a new criminal information on July 8, 1983 alleging that Jaffe had engaged in organized fraud with respect to the Putnam County real estate transactions.

Perjury charges were also filed on March 2, 1984. This information stated that Jaffe had perjured himself in the state court *Raymond* action on December 11, 1981, and in the present federal action on January 11, 1982, when he submitted written responses to questions concerning the finances of the petitioner corporations which omitted material information such as certain bank accounts maintained by the corporations and certain payments which had been made.

On September 4, 1984 the magistrate granted Grants' outstanding motions to compel discovery and ordered responses within ten days. Prior to the expiration of that ten day period the petitioners advised the District Court on September 14 that Jaffe, in light of the filing of these new state criminal charges, sought to invoke his Fifth Amendment privilege with respect to the discovery requests. Petitioners also moved to stay discovery pending the termination of the criminal proceedings.

The District Court responded to the assertion of the Fifth Amendment and petitioners' application by characterizing petitioner Jaffe as a "walking fraud". (Record at 2744, p.23)* It summarily prompted Grant to renew his motion for enforcement of the $3 million state court "supplemental" final judgment even

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* The District Court also went on to excoriate Jaffe at length, stating:

> I don't know why the taxpayers in the United States of America ought to pay my salary and the salary of all these people and the utilities that are provided for here in this courtroom to allow him to continue the perpetration of this fraud.

though it had previously denied that exact same motion on August 6, 1984. Shortly thereafter, on October 2, 1984, the District Court ruled that the supplemental final judgment of $3,000,000 should be enforced against petitioner corporations as well as against petitioner Jaffe who had been deemed to be the alter ego of the corporations by virtue of the court's October 15, 1982 order which struck petitioners' answer to Grant's counterclaim. Despite the judgment finding Jaffe to be the alter ego of the corporate petitioners, the Court denied their motion to stay discovery and held that the assertion of the Fifth Amendment was untimely.

(2) *The Proceedings Below*

Petitioners filed its complaint on May 15, 1981. An answer and counterclaim was filed on September 9, 1982. A default judgment was entered against petitioners on the counterclaim on October 15, 1982 (A-32). Final judgment for $3,000,000 was entered on October 2, 1984 (A-19).

On timely appeal, the Court of Appeals affirmed. 793 F.2d 1182 (11th Cir. 1986) (A-3). In a footnote the Court of Appeals rejected petitioners' due process arguments stemming from Jaffe's assertion of the Fifth Amendment privilege and the petitioners' motion for a stay. (A-16). A Petition for Rehearing and Suggestion for Rehearing En Banc was denied on September 26, 1986 (A-1).

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of this Court and other Courts of Appeal regarding the application of the privilege against self-incrimination to the act of compelled production of documents as recognized in *United States v. Doe*, 465 U.S. 605 (1984).

The decision below also conflicts with the decision of this Court in *United States v. Kordel*, 397 U.S. 1 (1970) regarding the timely assertion of the privilege against self-incrimination

and the appropriateness of staying discovery in a civil action pending conclusion of a parallel criminal proceeding.

In the alternative, the decisions below, even if they did not deprive petitioners of Fifth Amendment privileges or rights *per se* were such a departure from proper standards in the administration of justice that this Court should reverse the judgment in the exercise of its supervisory power.

POINT I

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS REGARDING THE PRIVILEGE AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AMENDMENT

The Fifth Amendment to the United States Constitution protects an individual asserting the privilege from compelled self-incrimination, *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972), including the compulsory production of incriminating privileged documents. *Couch v. United States*, 409 U.S. 322, 327-28 (1973). The privilege also extends to individual custodians of records of collective entities where the act of production would be testimonial and incriminating. *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976); *See* Comment, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 Harv. L. Rev. 640 (1986). For example, in *United States v. Doe*, an individual's act of producing business bank records of a sole proprietorship was held to be privileged under the 5th Amendment since "the act of producing the documents would involve testimonial self-incrimination". *Id.* at 613.

In light of *Doe*, some Courts of Appeal have since held that its rationale encompasses a situation where the individual withholds personally incriminating documents belonging to a corporation. *See e.g. In re Grand Jury Matter Brown*, 768 F.2d 525 (3d Cir. 1985) (en banc). Similarly, in *In re Grand Jury*

Subpoena Duces Tecum, 769 F.2d 52 (2d Cir. 1985) the Second Circuit indicated that an individual may, in some circumstances, have a Fifth Amendment privilege to refuse to produce corporate documents. *See also*, *In re Grand Jury Proceedings (Morganstern)*, 747 F.2d 1098 (6th Cir. 1984) *cert. denied*, 106 S. Ct. 594 (1985). Other Circuits, including the Eleventh Circuit, have reached contrary conclusions. *See e.g. In re Grand Jury Subpoena*, 784 F.2d 857 (8th Cir), *cert. granted*, *See v. United States*, 107 S. Ct. 59 (1986); *In re Grand Jury Subpoena Duces Tecum Howard Ackerman*, No. 86-8388 (11th Cir. July 14, 1986).[5]

In light of these decisions, petitioner Jaffe's invocation of his Fifth Amendment privilege on September 14, 1984 was valid and appropriate, and for the same reasons, his situation is distinguishable from those Circuit Court opinions, such as *Ackerman*, *supra*, No 86-8388 which have held that an individual has no privilege to withhold personally incriminating corporate documents.

In the instant case, unlike *Ackerman*, it was not left to the corporations to choose whether to designate Jaffe as a corporate custodian. The discovery requests in response to which the privilege was asserted were directed to all plaintiffs, including Jaffe in his personal capacity. (Record at 1639-43) Moreover, Jaffe was not asserting the privilege in his capacity as a custodian designated by a corporation. Before Jaffe even had occasion to assert the privilege, Respondent Grant had charged and the District Court had already found that he was the alter ego of the corporate petitioners. (Record at 1591-95) In effect, Jaffe and the other petitioners were not distinct entities; they were one and the same. Moreover, even if he had not been held to be their alter ego, Jaffe's assertion that he was the only

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[5] This case was decided after the District Court's decision granting final judgment, but four days before the Eleventh Circuit issued its opinion affirming the judgment in this case. In the opinion below the Eleventh Circuit did not refer to this decision.

person who remained an active corporate officer was undisputed and indisputable. (Record of 2733) Many cases which denied the assertion of the privilege by custodians of corporate records presumed the availability of other suitable individuals to whom the corporation could turn. *United States v. Lang*, 792 F.2d 1235, 1240-41 (4th Cir.), *cert. denied*, 55 U.S.L.W. 3392 (1986); *United States v. Barth*, 745 F.2d 184, 189 (2d Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *United States v. Sancetta*, 788 F.2d 67, 74 (2d Cir. 1986); *In re Grant Jury Matter Brown*, 768 F.2d 525, 529 (3d Cir. 1985). Finally, in this case unlike many others, the prospect of incrimination was not merely potential but was real and present. Jaffe was facing simultaneous criminal prosecution on charges of fraud and perjury directly related to the discovery requests to which the privilege was claimed.

Rather than honor the privilege which petitioner Jaffe asserted, the District Court improperly deprived all petitioners of the process which was due them. It penalized petitioner Jaffe for the assertion of the Fifth Amendment and it denied the petitioner's motion to stay discovery even though the District Court itself had previously found Jaffe to be their alter ego and even though it was undisputed that Jaffe was the only individual in a position to respond.

This Court and Circuit Courts have consistently held that a litigant cannot be penalized for asserting the Fifth Amendment privilege against self-incrimination. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); *Spevack v. Klein*, 385 U.S. 511, 515 (1967); *Griffin v. California*, 380 U.S. 609, 614 (1965). This rule is especially applicable in civil cases involving a party who asserts the Fifth Amendment in response to an opponent's discovery. In these instances, automatic dismissal of the party's lawsuit is improper. *Attorney General of United States v. Irish People, Inc.*, 684 F.2d 928, 953 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979), *reh'g denied*, 611 F.2d 1026 (5th Cir. 1980); *Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir. 1979); *Bootz v. Childs*, 627 F. Supp. 94 (N.D. Ill. 1985).

For example, *In Wehling v. Columbia Broadcasting System*, *supra*, 608 F.2d 1084, plaintiff's libel suit was dismissed after he invoked the Fifth Amendment numerous times during his oral deposition. The Fifth Circuit reversed and held that,

> [D]ismissing a plaintiff's action with prejudice solely because he exercises his privilege against self-incrimination is constitutionally impermissible. Wehling had, in addition to his Fifth Amendment right to silence, a due process right to a judicial determination of his civil action. When the district court ordered Wehling to answer CBS' questions or suffer dismissal, it forced plaintiff to choose between his silence and his lawsuit. The Supreme Court has disapproved of procedures which require a party to surrender one constitutional right in order to assert another. *Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). Similarly, the Court has emphasized that a party claiming the Fifth Amendment privilege should suffer no penalty for his silence.

Id. at 1087-1088.

In this case the entry of final judgment against petitioners was similarly improper and inconsistent with these decisions. In effect it required Jaffe to surrender one constitutional right to be able to assert another and was tantamount to an impermissible automatic penalty for the assertion of the Fifth Amendment privilege which Jaffe sought to make.

When advised of the petitioner's assertion of the privilege, the District Court responded abusively and accused Jaffe of being many things including "a walking fraud".[6] Regardless of the District Court's view of his status, Jaffe had a right to assert

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[6] Before the Eleventh Circuit the petitioners argued that the Court's remarks evidenced such pervasive bias and animus that it was error for the District Court not to recuse itself. (A-12-A-13) Even if its failure to recuse were not error *per se*, it should not be disregarded in the context of petitioners' due process claims. cf. *Sheppard v. Maxwell*, 384 U.S. 333, 352-53 (1966).

his Fifth Amendment privilege under the Constitution, especially since he *was* facing new criminal charges.

Moreover, the District Court did not balance the prejudice to petitioner from proceeding with discovery against the prejudice to their adversary from staying the action. Rather, the District Court rejected such considerations. (Record at 2744, A-) It encouraged Respondent Grant to renew a motion which the Court itself had previously rejected only one month before, and it summarily rejected *Wehling v. Columbia Broadcasting System*, *supra*, as "bad law". (Record at 2744, p.13). Shortly thereafter, the District Court granted the same motion that it had previously denied even though the only changed circumstance was Jaffe's assertion of his Fifth Amendment privilege and the petitioners' motion to stay the action.

It is equally plain that the District Court's denial of the motion to stay also deprived all petitioners of their due process rights. *United States v. Kordel*, 397 U.S. 1 (1969). In *Kordel*, this Court discussed a situation "where no one [on behalf of a corporation could] answer the interrogatories addressed to the corporation without subjecting himself to a 'real and appreciable risk' of self-incrimination." *Id.* at 8-9. (citation omitted) This Court assumed that "in such a case the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action." *Id.* In *Kordel*, however, this Court did not decide this "troublesome question" because "nobody associated with the corporation asserted his privilege at all" and the parties did not suggest that the persons who did answer the discovery request on behalf of the corporation do so while unrepresented by counsel or without appreciation of the possible consequences. *Id.* at 9-10.

In this case just the opposite occurred. Jaffe had previously been held to be the "alter ego" of the corporate petitioner. He asserted his Fifth Amendment privilege rather than answer the discovery requests. (Record at 2710-31) He also asserted and it was not disputed that he was the only active officer of the corporate petitioners. (Record at 2733) Finally, as even the

District Court acknowledged, all petitioners moved to stay discovery pending the outcome of the criminal prosecutions against Jaffe. (A-28)

In sum, the District Court's subsequent entry of final judgment had the effect of improperly infringing Jaffe's Fifth Amendment privilege and all petitioners' due process rights. Its decision is inconsistent with *Kordel*, and it raises the troublesome and important question of federal law which this Court identified but did not decide in *Kordel*. That question should be settled by this Court.

Notwithstanding the foregoing, both the District Court and the Court of Appeals relied upon *United States v. Kordel, supra*, as support for the determination that the petitioners had not timely asserted these issues. These determinations are also inconsistent with *Kordel* as well as the well-established policy of this Court which frowns upon findings of waiver of important constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Michigan v. Jackson*, 106 S. Ct. 1404, 1409 (1986). While the privilege against self-incrimination may be waived by inaction, *Maness v. Meyers*, 419 U.S. 449, 466 (1975), waiver is not to be presumed or lightly inferred. *Smith v. United States*, 337 U.S. 137 (1949); *Barker v. Wingo*, 407 U.S. 514, 525-26 (1972); *Estelle v. Williams*, 425 U.S. 501, 515 (1976) (Powell, J., concurring). Indeed, this Court has repeatedly held that "[a]lthough the privilege against self-incrimination must be claimed, when claimed it is guaranteed by the Constitution. . . . Waiver of constitutional rights...is not lightly to be inferred." *Smith v. United States, supra*, 337 U.S. at 150.

Neither the record below nor the *Kordel* decision in particular, support the conclusion that petitioner Jaffe had intentionally and knowingly waived his Fifth Amendment privilege. Jaffe was not charged with organized fraud charges until July 8, 1983, and it was not until even later that he was charged with perjury on March 2, 1984. By that time, the petitioner had already objected to the discovery requested on other grounds. Those objections had been *sub judice* ever since

Respondent Grant had filed motions to compel on February 17, 1983, and March 11, 1983. (Record at 2384-90, 2420-23) These same motions remained *sub judice* until September 4, 1984. It was not until then that a decision was rendered and Jaffe was ordered to comply with the discovery requests within ten days. After the motion was decided the privilege *was* asserted and petitioners *made* their motion to stay. Under such circumstances, it was error to decide that they should have been asserted sooner.

For the same reasons *United States v. Kordel* is distinguishable. In this case the Fifth Amendment privilege *was* sought to be asserted, and a motion to stay discovery was made. In *Kordel* it was not asserted and no motion for stay was *ever* made. *Kordel*, *supra* 397 U.S. at 8-9. If anything, *Kordel* supports the conclusion that the stay motion and Jaffe's assertion of his privilege were timely. In *Kordel*, this Court suggested that the party responding to the discovery might be excused for not raising his privilege if he was unrepresented by counsel. *Id.* at 9-10. Other decisions of this Court have reflected a similar concern. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

The situation below presented an analagous circumstance which underscores the error of the Court of Appeals and District Court decisions. While not unrepresented, petitioners' then counsel in the District Court affirmatively undermined petitioners' attempt to assert his Fifth Amendment rights and privileges. Not having considered this Court's opinions referred to *supra*, petitioners' counsel sought to withdraw from representing the petitioners and disavowed their attempt to assert these claims without drawing attention to the cases which validate their position. (Record at 2732-36, 2744, pp. 15-27) While petitioners did not assert that this deprived them of the effective assistance of counsel below, it should and can be considered on the question of waiver as this Court suggested in *Kordel*. Petitioners should not be faulted for not having sooner asserted a claim which they were discouraged from presenting by their then counsel.

POINT II

EVEN IF THE ACTIONS OF THE DISTRICT COURT DID NOT INFRINGE PETITIONERS' FIFTH AMENDMENT RIGHTS AND PRIVILEGES *PER SE*, THE DISPOSITION OF PETITIONERS' CLAIMS WARRANTS THIS COURT'S EXERCISE OF ITS SUPERVISORY POWER

Even if the petitioners' constitutional rights were not infringed *per se*, the disposition of those claims was such a departure from fair standards in the administration of justice that this Court's exercise of its supervisory power in civil actions is warranted. Such oversight in civil actions is well established. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 571 (1979); *Connor v. Johnson*, 402 U.S. 690 692-93 (1971); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 115 (1946); *see also* Supreme Court Rule 17.1(a). In particular, among the pertinent facts warranting such consideration in this case is the District Court's abusiveness of petitioner Jaffe when he was not properly assisted or defended by his then counsel in the assertion of valid constitutional claims.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Dated: New York, New York
December 24, 1986

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

for the

Eleventh Circuit

No. 84-3747

SIDNEY JAFFE, Individually,
MEADOW VALLEY RANCHOS, INC., etc., et al.,

Plaintiff-Counter-claim-Defendants-Appellee,

—v.—

CHARLES W. GRANT, Individually,
and as trustee in bankruptcy for
CONTINENTAL SOUTHEAST LAND CORP.,
and as receiver,

Defendant-Counter-claim-Plaintiff-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE MIDDLE DISTRICT OF FLORIDA

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 18, 1986, 11 Cir., 1986, 803 F.2d 1185).

(September 26, 1986)

Before FAY, CLARK and NIES*, Circuit Judges.

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* Honorable Helen W. Nies, U.S. Circuit Judge for the Federal Circuit, sitting by designation

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

FOR THE COURT:

PETER T. FAY

United States Circuit Judge

In the

United States Court of Appeals

for the

Eleventh Circuit

No. 84-3747

SIDNEY L. JAFFE, Et al.,
Plaintiffs-Counter-Claim-Defendants-Appellants,

—v.—

CHARLES W. GRANT, individually and
as Trustee in Bankruptcy for
CONTINENTAL SOUTHEAST LAND CORP.,
and as Receiver,
Defendant-Counter-Claim-Plaintiff-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

TERRANCE E. SCHMIDT, Jacksonville, Fla.
for defendant-counter-claim-
plaintiff-appellee.

FLETCHER N. BALDWIN, JR.,
Holland Law Center, University
of Florida, Gainesville, Fla.,
for plaintiff-counter-claim-
defendant-appellant Jaffe.

PETER I. WALDMANN, Toronto, Ontario,
for plaintiffs-counter-claim-
defendants-appellants.

Before FAY, CLARK and NIES,* Circuit Judges.

NIES, Circuit Judge:

Sidney L. Jaffe, Meadow Valley Ranchos, Inc., Atlantic Commercial Development Corp., and Ruby Mountain Construction and Development Corp. appeal the judgment of the United States District Court for the Middle District of Florida (Jacksonville Division, John H. Moore, J.) awarding Charles Grant, trustee in bankruptcy for Continental Southeast Land Corp., the sum of $3 million plus interest. Trustee Grant had received a state court judgment of that amount which is the basis for the district court's judgment here. Jaffe et al. assert a number of errors by the district court in giving full faith and credit and the effect of *res judicata* to the state court judgment. We affirm.

Background

The genesis of this action occurred in 1972 when Continental Southeast Land Corporation bought a large tract of Florida land, subdivided it into more than 2800 lots, and began selling the lots to individuals on installment contracts payable to Continental. At the same time Continental was borrowing from individual investors. Sidney Jaffe was vice-president of Continental. Through a series of transactions in 1976 and 1977, Continental's interests in the remaining land and the vendee accounts were transferred to Meadow Valley Ranchos, Inc., Ruby Mountain Construction & Development Corp., and Atlantic Commercial Development Corp. (collectively, the corporations). Sidney Jaffe was president of each corporation. Shortly thereafter Continental defaulted on payments to its investors. The investors responded by filing suit in the Circuit Court of Putnam County, Florida, against Continental and the corporations to set aside the transfers of land and the vendee contracts as fraudulent and to appoint a receiver for Continental. *Barbara Raymond et al. v. Continental Southeast Land Corp.*, No. 78-416.

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* Honorable Helen W. Nies, U.S. Circuit Judge, for the Federal Circuit, sitting by designation.

In June, 1979, Jaffe caused Continental to file a Chapter XI petition under the Bankruptcy Act. In January, 1980, the bankruptcy court adjudicated Continental bankrupt and appointed Charles Grant, the appellee herein, as trustee. After the bankruptcy court lifted the statutory automatic stay, the state court in the *Raymond* case substituted the trustee Grant for Continental and realigned him as a plaintiff. In March, 1981, the state court entered a final default judgment setting aside the transfers, holding the corporations liable to return the sums collected from the contract vendees and ordering an accounting. The corporations appealed the state court's March, 1981, order. In the interim, they refused to make the accounting and were held in contempt by the trial court. Because of their continuing contempt, the appellate court dismissed the appeal. *Atlantic Commercial Development Corp. v. Raymond*, No. 81-560 (Fla. 5th Dist.Ct.App. Sept. 10, 1981).

Meanwhile, Jaffe had been arrested and charged with failure to deliver deeds to lot purchasers in violation of the Florida Uniform Land Sales Practices Law.[1] On May, 15, 1981, the eve of his criminal trial, Jaffe and the corporations filed the subject action in the United States District Court for the Middle District of Florida charging that trustee Grant and others had conspired to violate their civil rights and seeking to restrain the state criminal case. Trustee Grant responded, *inter alia*, with a counterclaim seeking enforcement of the *Raymond* judgment for an accounting against Jaffe individually as well as against the corporations on the ground that the corporations were merely his alter egos.

During the course of these proceedings, trustee Grant moved for sanctions for Jaffe's failure to appear at scheduled

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[1] Jaffe did not appear for trial in the criminal case, *see Accredited Surety & Casualty Co. v. State*, 418 So.2d 378 (Fla. 5th Dist.Ct.App.1982), and was convicted of failure to appear as well as the Land Sales Act violations. The land sales convictions were overturned on appeal, but the failure to appear conviction was upheld. *Jaffe v. State*, 438 So.2d 72 (Fla. 5th Dist.Ct.App.1983). Jaffe's partial victory in the Court of Appeals may prove pyrrhic, however; Jaffe was subsequently charged with organized fraud. *See Jaffe v. Sanders*. 463 So.2d 318 (Fla. 5th Dist.Ct.App.1985).

depositions. The district court granted the motion and awarded attorney fees. When the attorney fees were not paid as ordered, trustee Grant filed a renewed motion for sanctions, resulting in an additional award for fees incurred in connection with Grant's seeking compliance with the first order. During this time, Jaffe et al. had also failed to timely comply with the court's order directing them to respond to the trustee's interrogatories and request for production. Jaffe et al. did respond four days late, but in an incomplete and evasive manner, refusing to answer certain interrogatories and to produce certain documents. The court entered an order compelling them to produce the documents and answer the interrogatories. Their responses were again non-responsive, evasive and incomplete. Again Grant moved for sanctions, this time asking that Jaffe et al.'s answer to the counterclaim be stricken. No action was taken by the court on the motion at that time.

At the sentencing hearing at his criminal trial, Jaffe indicated that he would voluntarily dismiss the instant action. When the offer was made in this action, the trustee Grant refused to agree to dismissal unless Jaffe paid the trustee's reasonable costs and attorney fees. With that condition, the district court dismissed the complaint and also dismissed without prejudice the trustee's counterclaim for enforcement of the state court judgment. The trustee moved for reconsideration seeking to have counterclaim reinstated. By order of August 12, 1982, the district court reinstated the trustee's counterclaim noting that jurisdiction over the counterclaim, based on diversity, was independent of jurisdiction over the dismissed complaint. In that same order, the court granted the trustee's renewed motion for sanctions "in light of [plaintiffs'] flagrant and continued failure to comply with discovery requests and Court orders." The court, however, withheld ruling on what the sanction should be. Jaffe et al. took no action to cure their failure to comply with the court's orders. After a hearing, the district court struck Jaffe et al's answers to the trustee's counterclaim and entered judgment by default.

In the *Raymond* action, which was again before the state trial court, Grant served a request for admission that the corporations had received more than $3 million from contract vendees

of Continental. Again, the corporations evaded and Grant moved to strike their answers to the discovery request as a sanction. After a hearing, the state court struck the corporations' responses because of their evasive nature and deemed the request with respect to the $3 million figure admitted. On appeal of that ruling, the Florida appellate court affirmed. *Ruby Mountain Construction & Development Corp. v. Raymond*, 409 So.2d 525 (Fla. 5th Dist.Ct.App.1982). The state trial court then granted the trustee's motion for summary judgment and entered a Supplemental Final Judgment in the amount of $3 million plus interest. The corporations appealed but their appeal was dismissed as frivolous, with attorney fees for a bad faith appeal being assessed. *Atlantic Commercial Development Corp. v. Raymond*, No. 82-724 (Fla. 5th Dist.Ct.App. June 30, 1982). Accordingly, the Supplemental Final Judgment became final and non-appealable.

Grant then moved that the district court enter a damage award against Jaffe et al. jointly and severally in favor of the trustee for $3 million plus interest based on the state court Supplemental Final Judgment. Judgment in this amount was entered on October 2, 1984. Jaffe et al. timely appealed the decision of the district court to this court.

I.

Jurisdiction

As a threshold matter, Jaffe et al. assert that the district court did not have subject matter jurisdiction over the trustee's counterclaim because the parties had purportedly settled the trustee's claim in the bankruptcy proceeding and, in any event, the parties had agreed to have the bankruptcy court resolve any further disputes between them. The district court held that the "settlement" agreement did not deprive it of jurisdiction:

> [D]espite plaintiffs' attempts to characterize the security agreement as constituting a full and complete compromise and settlement of all of the disputes between the parties, the agreement provides on its face

> that it was to be merely an executory accord until performed by all parties and the parties further agreed that the statute of limitations on defendant GRANT's claim against plaintiffs would be tolled during the period of performance of that agreement. Therefore, defendant GRANT was not barred by the settlement agreement from asserting, after the plaintiff corporations' breach of that settlement agreement, all claims he had to the fraudulently conveyed property. *E.g.*, *Hannah v. James A. Ryder Corp.*, 380 So.2d 507 (Fla. 3d Dist.Ct.App.1980).
>
> Plaintiffs also claim the bankruptcy court had the sole jurisdiction to determine the effect of the settlement agreement. The settlement agreement does provide that [corporate plaintiffs] submit to the jurisdiction of the bankruptcy court for purpose of settling their disputes with the trustee arising out of any breach of settlement agreement and any such claim "may" be brought in the bankruptcy court. Nothing in the settlement agreement provided that the bankruptcy court would have exclusive jurisdiction over any disputes arising out of the breach of the settlement agreement and such a determination would be inconsistent with the executory accord language of the settlement agreement. Moreover, the record reflects that after entry of the final default judgment but prior to entry of the supplemental final judgment, plaintiffs filed an action in the bankruptcy court against defendant GRANT, alleging that he breached the settlement agreement. As noted above, that action was dismissed with prejudice for the plaintiff corporations' failure--specifically the failure of Sidney L. Jaffe as president of each of the plaintiff corporations--to submit to discovery.

Jaffe et al. have not tried to bolster the argument made below and do not address the findings or conclusions of the district court. We are unpersuaded that the district court's analysis of this issue was erroneous, factually or as a matter of law.

[1] Jaffe et al. also contend that the district court had no jurisdiction to "reinstate" the counterclaim because the trustee's counterclaim was never effectively filed. The basis for this argument is that the trustee filed his answer containing the counterclaim "subject to" his earlier filed motion to dismiss. Per Jaffe et al., at the time they withdrew their complaint, Grant had not yet filed his answer so that they had a right to withdraw under Fed.R.Civ.P.41(a). Under this theory the court had not acquired jurisdiction over the counterclaim and, thus, could not "reinstate" it.

The trustee states that he filed his answer "subject to" his motion to dismiss merely to avoid waiving that motion by filing his answer; that Jaffe et al. answered the counterclaim and never asserted to the district court that the counterclaim had not been filed; and that Rule 41(a)(2) specifically contemplates that a complaint may be dismissed while a counterclaim remains pending.

Under the circumstances, we conclude that the district court did not err in treating the counterclaim as filed. Further, since the trustee's counterclaim had an independent jurisdictional basis, the court had erred in dismissing it. *Deauville Corp. v. Garden Suburbs Golf & Country Club*, 165 F.2d 431 (5th Cir.1948); accord *Ferguson v. Eakle*, 492 F.2d (3d Cir. 1974); 9 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2365 (1971); 5 J. Moore, *Moore's Federal Practice*, § 41.09 (2d ed. 1985). Thus, the counterclaim was properly reinstated.

II.

Effect of State Court Judgment

The judgment of a state court is entitled to full faith and credit under Article IV, Section 1, United States Constitution and by 28 U.S.C. §1738. Jaffe et al., nevertheless, assert that the *Raymond* Supplemental Final Judgment may be collaterally attacked in these proceedings.

[2] First, Jaffe et al. assert that the state civil judgment was not an "adjudication on the merits" for *res judicata* purposes because

there was no "trial on the merits." As sanctions for discovery abuses, the state court struck responses to the trustee's requests for admissions and deemed the statements admitted. Jaffe et al. insist that the state court judgment results from the deemed admissions which under Florida R.Civ.P. 1.370(b) and Fed.R.Civ.P. 36(b) have effect only in that litigation. Contrary to Jaffe's analysis, the district court did not give effect to an admission, but rather full faith and credit to a state court judgment, as required by statute and the Constitution.

[3] Next, Jaffe et al. argue that the state court judgment is void because it stemmed from orders that were entered during the time that the state court proceeding was automatically stayed by the bankruptcy proceeding. We agree with the district court that that argument:

> is simply an attempt to extend beyond all rational bounds the legal principle that a judgment entered without subject matter jurisdiction is void and may be subject to collateral attack. The undisputed fact is that the *Barbara Raymond* court had subject matter jurisdiction on March 10, 1981, when it entered the Final Default Judgment and on April 27, 1982, when it entered the Supplemental Final Judgment. Therefore, even if plaintiffs were correct and the *Barbara Raymond* court erred in relying upon the plaintiffs' failure to comply with the previous orders in entering the Final Default Judgment, that error is not a jurisdictional matter and could only have been corrected, if at all, on direct appeal. *See Parker Bros. v. Fagan*, 68 F.2d 616, 618 (5th Cir.1934); *Malone v. Meres*, [91 Fla. 709], 109 So. 677, 684-89 (Fla.1926).

[4] Jaffe et al. also assert that, because they were held in default, they have been unable to litigate the issue of the jurisdiction of the state court and, thus, they may raise the jurisdictional issue against enforcement of the judgment in this proceeding. Jaffe et al.'s analysis is flawed in that this case involves *res judicata* in the sense of claim preclusion, not collateral estoppel (or issue preclusion). Thus, contrary to Jaffe et al's assertion, the

determinative factor here is not whether the issue was litigated, but whether Jaffe et al. had an *opportunity* to litigate the matter. *AGB Oil Co. v. Crystal Exploration & Production Co.*, 406 So.2d 1165, 1167-68 (Fla 3d. Dist.Ct.App.1981). As the district court stated:

> Plaintiffs' contention that the supplemental final judgment is unenforceable because there was no "trial on the merits" is particularly disengenuous in view of the fact that it was the plaintiff corporations' own misconduct in the state court action which prevented any trial on the merits and caused the entry of the $3 million judgment against them.

[5] In any event, a state court judgment must be given the *res judicata* effect required under the state's governing precedent. *Parsons Steel, Inc. v. First Alabama Bank*, ---U.S.----, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986). Jaffe has cited no pertinent precedent that would lead to the conclusion that Florida courts would not enforce the subject judgment. On the contrary, in view of the Florida appellate court's consideration of the proceedings on several occasions, the last affirmance resulting in sanctions for a frivolous appeal, we are wholly unpersuaded that the $3 million judgment is unenforceable in Florida.

[6] Jaffe argues that the state judgment is unenforceable against him personally because he was not formally a party to the state civil case. However, the district court found that Jaffe was in privity with the corporations, indeed their alter ego, and thus, he is as bound by the Supplemental Final Judgment as the corporations.[2] *Mendelsund v. Southern-Aire Coats*, 210 So.2d 229 (Fla. 3d Dist.Ct.App.1968); *accord*, *Dudley v. Smith*, 504 F.2d 979, 982-83 (5th Cir.1974). Jaffe argues that the court's finding

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[2] Jaffe et al. also challenge the district court's purported application of *res judicata* to the state court criminal judgment which was later reversed-in-part on appeal. Jaffe et al. have made no attempt to show that *res judicata* was applied below to the state *criminal* judgment. Rather, the district court accorded *res judicata* effect to the state *civil* judgment.

flows only from the striking of its answer, not from evidence. Unless the striking was error, and we conclude *infra* it was not, the finding must stand.

III.

Recusal

Jaffe et al. assert that the district court abused its discretion by denying their motion for Judge Moore to disqualify himself under 28 U.S.C. § 455 (1982).[3] Jaffe et al. see prejudice against Jaffe in statements the trial judge made from the bench during a status conference.

The standard for disqualification under § 455 has been stated as follows:

> It is well settled that under either Section 144 or Section 455 an allegation of bias sufficient to require disqualification must demonstrate that the bias is personal as distinguished from judicial in nature. The alleged bias and prejudice, in order to be personal and therefore disqualifying, "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). Thus, a motion for recusal may not ordinarily be predicated upon the judge's rulings in the same or a related case. An exception to the

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[3] Jaffe et al. allege violation of 28 U.S.C. §§ 455(a) and (b)(1), which state:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

> general rule that the disqualifying bias must stem from extrajudicial sources is the situation in which "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." *Davis v. Board of School Comm'rs*, *supra*, 517 F.2d [1044] at 1051 [(5th Cir.1975)].

United States v. Phillips, 664 F.2d 971, 1002-03 (5th Cir., Unit B 1981) (footnotes omitted).

[7] In this case, the court's statements reflect its perception of the underlying facts of the case, Jaffe et al.'s litigation tactics, and their incessant changing of attorneys. The district court's statement were based on knowledge the court had gained in a purely judicial context by presiding over this action and a habeas corpus proceeding filed by the Canadian government.[4] Thus, the statements are not a basis for recusal unless they demonstrate pervasive bias and prejudice against Jaffe. We are not persuaded that the instant circumstances are of such an extreme nature that the statements demonstrate pervasive bias and prejudice. The trial court did not abuse its discretion by denying Jaffe's recusal motion.

IV.

Sanctions

As sanctions, pursuant to Fed.R.Civ.P. 37(b)(2), for Jaffe et al.'s refusal to comply with discovery orders, the district court entered an order striking their answer and defenses to the trustee's counterclaim. Jaffe et al. argue that the imposition of these draconian sanctions was unwarranted. However severe the sanctions though, "[w]e will not interfere unless important historical findings are clearly erroneous or--by the imposition of sanctions

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[4] Factual knowledge gained during earlier participation in judicial proceedings involving the same party is not sufficient to require a judge's recusal. *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 965 (5th Cir.), *cert. denied sub nom., Mead Corporation v. Adamas Extract*, 449 U.S. 888, 101 S.Ct. 244, 66 L.Ed.2d 114 (1980).

which are not 'just'--there has been an abuse of discretion." *Marshall v. Segona*, 621 F.2d 763, 767 (5th Cir. 1980).

[8] Jaffe et al. proffer a laundry list of reasons why the sanctions imposed below are too harsh.[5] Their first argument, perhaps the nadir of this frivolous collection, is that the deterrent value of the sanction could have been substantially achieved by use of one less drastic. *See Id.* at 768. At oral argument, counsel suggested that an award of costs might have been appropriate. However, such a suggestion flies in the face of the record as well as the facts found by the district court:

> It should be further noted that sanctions in the form of attorneys' fees have twice been imposed on Plaintiffs during the course of this litigation. On January 25, 1982, attorneys' fees were taxed against Plaintiffs for their unjustified failure to attend scheduled depositions. Plaintiffs did not timely pay Defendants the fees imposed by the court as sanctions and, therefore, further sanctions were imposed against Plaintiffs on February 16, 1982.
>
> It is abundantly clear to the Court that the lesser sanctions contemplated by Rule 37, *Fed.R.Civ.P.*, are not effective in compelling Plaintiffs to conduct discovery in a timely and responsive manner.

Jaffe et al. do not challenge these findings as clearly erroneous. No basis exists for the argument that less drastic sanctions would have been appropriate.

[9] Jaffe et al. next argue that imposition of any sanctions was inappropriate because the trustee suffered no prejudice from their

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[5] The arguments address each factor identified in *Marshall v. Segona*, 621 F.2d at 768, for determining whether the sanction of dismissal is too harsh for a particular case. The court in *Marshall* recognized that striking pleadings will sometimes, as here, have the same effect as dismissal. *Id.* at 766 n.4. Accordingly, it is appropriate to look at those same factors here, where the court's imposition of sanctions resulted in judgment for the trustee.

failure to respond to the trustee's requests for admissions, relying on *Marshall v. Segona*, 621 F.2d at 768. Jaffe et al. base their assertion of no prejudice on a statement of the trustee, in his motion to reconsider striking the counterclaim, that "[t]he Counterclaim is presently at issue and ready to be set for pretrial conference and trial." They reason that the trustee could not have been prejudiced by a failure to respond to discovery if he was ready to go to trial. In making this argument, Jaffe et al. ask us to examine one statement out of context and ignore all the surrounding circumstances. This we refuse to do. At the time the trustee's attorney made that statement, the trustee was vigorously attempting to pry from Jaffe et al. information concerning the amount of funds they had received from Continental's contract vendees. The subject requests for admissions remained unanswered when the trial court imposed sanctions. In view of the above circumstances, the assertion that the trustee suffered no prejudice is patently frivolous.

[10] Jaffe et al. seek to place the blame for their longstanding refusal to comply with discovery on one of their former attorneys. *See Id.* They claim that this attorney has possession of the documents sought by Grant. Jaffe et al. also argue that their failure to comply with the court's orders was due to inability. *See Id.* Purportedly Jaffe was prevented from complying by his health problems and, later, incarceration at various correctional institutions. However, neither of Jaffe's alleged problems can excuse repeated nonresponsive, evasive and incomplete answers to interrogatories and requests for admissions. For example, Jaffe's alleged problems with his health, incarceration and attorneys cannot excuse the intentional misconduct of producing documents with critical portions torn off.

In sum, Jaffe et al. have failed to establish that the district court abused its discretion in imposing the sanction of striking their answer to the counterclaim.

V.

The, arguments of Jaffe et al. that the proceedings lacked due process, in the main amount, to no more than assertions of the above arguments in different garb.[6] Jaffe et al. received not only the minimum process that was due, but also a great deal more.

We AFFIRM the decision of the district court.

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[6] Appellants' argument with respect to the fifth amendment privilege against self-incrimination is obscure and appears to be advanced in support of their due process argument. On this issue, the district court held, *inter alia*, that any privilege was waived "by plaintiffs' failure to timely assert such privilege in response to defendant GRANT's discovery or even prior to the hearing on all pending discovery motions before the magistrate on September 4, 1984." Appellants assert no error with respect to when the privilege was first raised before the district court. Nor do they argue the court was wrong as a matter of law in holding that the privilege must be timely raised. In any event, we discern no error in the court's ruling. *United States v. Kordel*, 397 U.S. 1, 10, 90 S.Ct. 763, 768-69, 25 L.Ed.2d 1 (1970).

In the

United States Court of Appeals

for the

Eleventh Circuit

No. 84-3747 & 81-427

SIDNEY JAFFE, Individually,
MEADOW VALLEY RANCHOS, INC., etc., et al.,

Plaintiff-Counter-claim-Defendants-Appellee,

—v.—

CHARLES W. GRANT, Individually,
and as trustee in bankruptcy for
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and as receiver,

Defendant-Counter-claim-Plaintiff-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE MIDDLE DISTRICT OF FLORIDA

Before FAY, CLARK and NIES*, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

* Honorable Helen W. Nies, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

ON CONSIDERATIONS WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause by and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-counterclaim defendant-appellant pay to defendant-counterclaim-plaintiff-appellee, the courts on appeal to be taxed by the Clerk of the Court.

Entered: July 18, 1986
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: October 24, 1986

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SIDNEY L. JAFFE, et al.,

Plaintiffs,

— vs. —

E. L. EASTMOORE, et al.,

Defendants.

ORDER

At the status conference held September 20, 1984, defendant orally requested that the Court reconsider defendant GRANT's motion for final judgment. The Court granted defendant GRANT's request and scheduled a hearing on the motion for final judgment for September 28, 1984. At the hearing the parties appeared through counsel. Having reconsidered the motion, the Court finds that for the reasons stated below, the motion should be granted.

Background

On September 9, 1981, defendant GRANT filed a two-count counterclaim against plaintiffs. On October 14, 1982, the Court entered an Order striking plaintiffs' answer and defenses to defendant GRANT's counterclaim and entered a default against plaintiffs on the liability issues raised by the counterclaim.

At the status conference of September 20, 1984, defendant GRANT voluntarily dismissed Count I of the counterclaim and requested that the Court reconsider the motion for final judgment as to Count II only. Accordingly, the only issue remaining for resolution by the Court is the relief to which defendant Grant is entitled under Count II of the counterclaim.

In Count II of the counterclaim, defendant GRANT seeks to enforce the Final Default Judgment entered March 10, 1981,

by the Circuit Court of Putnam County, Florida, in the Case of *Barbara Raymond, et al. v. Continental Southeast Land Corp., et al.*, Circuit Court in and for Putnam County, Florida, Case No. 78-416, in which the court ordered Atlantic Commercial Development Corporation ("ACDC"), Ruby Mountain Construction & Development Corp. ("RM"), and Meadow Valley Ranchos, Inc. ("MVR") to account for and pay to defendant GRANT all sums collected by those corporations from contract vendees of Continental Southeast Land Corp. ("CSEL") and reserved jurisdiction to award damages in the event such monies were not paid to defendant GRANT. Additionally, defendant GRANT alleged that ACDC, MVR and RM were controlled by Sidney L. Jaffe to the extent that those corporations were simply his alter ego and that the corporations were operated by him as mere instrumentalities for the purpose of perpetrating a fraud upon the creditors of CSEL and defendant GRANT. The relief sought by defendant GRANT in Count II of his counterclaim in this action was the accounting ordered in the Final Default Judgment described above and damages against ACDC, MVR, RM and Sidney L. Jaffe, jointly and severally.

The parties have filed extensive portions of the trial and appellate court records from the *Barbara Raymond* case which evidence the facts described below relating to that case.

After entry of the final default judgment, ACDC, MVR and RM, whose president in each case is Sidney L. Jaffe, refused to account to defendant GRANT pursuant to the final default judgment in the *Barbara Raymond* action and refused to pay to him the sums they collected from the contract venders of CSEL.

Defendant Grant served requests for admissions on ACDC, MVR and RM, in the *Barbara Raymond* action, requesting that they admit they had collected more than $3 million from contract vendees of CSEL. In response to the request, ACDC, MVR, and RM filed dilatory and evasive responses to the requests for admissions. Accordingly, the state court struck their responses to the requests for admissions and deemed the statements admitted. ACDC, RM and MVR appealed that ruling and the Florida Fifth District Court of Appeal affirmed the trial court.

Ruby Mountain Construction & Development Corp. v. Barbara Raymond, 409 So.2d 525 (Fla. 5the DCA 1982).

After the affirmance by the appellate court, defendant GRANT filed a motion before the trial court seeking entry of a judgment of $3 million against ACDC, RM and MVR based upon the admitted statements described above. After due notice to all parties, a hearing was held. ACDC, MVR and RM were represented by counsel at the hearing but presented no evidence in opposition to the motion and did not contest in any way the amount of the judgment. They simply contended that the state court was without jurisdiction. Accordingly, on April 28, 1982, the *Barbara Raymond* court entered the supplemental final judgment for defendant GRANT and against ACDC, MVR and RM, jointly and severally, in the amount of $3 million plus additional sums as accumulated contempt fines and for attorneys fees incurred by defendant GRANT in connection with that action.

ACDC, MVR and RM appealed the supplemental final judgment to the Fifth District Court of Appeal of Florida. That court dismissed the appeal as frivolous and assessed attorneys fees against the appellants and their counsel for having filed and prosecuted the appeal in bad faith. ACDC, MVR, and RM did not seek further review of the order dismissing the appeal, and the supplemental final judgment is now final and non-appealable.

On October 19, 1982, defendant GRANT filed his Motion for Final Judgment in this action in which he contended that under the court's order of October 14, 1982, the supplemental final judgment, and the principles of res judicata and full faith and credit, he was entitled to judgment as a matter of law against ACDC, MVR, RM and Sidney L. Jaffe, jointly and severally, in the amount of $3 million plus accrued interest.

In opposition to defendant GRANT's motion, plaintiffs argued that the supplemental final judgment is not entitled to full faith and credit and has no res judicata effect for three reasons:

(a) The $3 million supplemental final judgment was not an "adjudication on the merits."

(b) Rule 1.370(b), *Florida Rules of Civil Procedures*, and Rule 36(b), *Federal Rules of Civil Procedure*, preclude the court from giving full faith and credit or res judicata effect to the supplemental final judgment because it was based upon admissions which could not be used in any proceeding other than the *Barbara Raymond* action.

(c) The supplemental final judgment was based upon the final default judgment which preceded it and the final default judgment in turn was based upon plaintiffs' refusal to comply with orders they contend were void because the state court supposedly had been deprived of jurisdiction over them by virtue of CSEL's filing a Chapter IX petition in bankruptcy.

Plaintiffs do not assert that there are any issues of disputed fact and all of the issues raised by the motion for final judgment and plaintiffs' response to the motion are issues of law. For the reasons stated below, the issues raised by plaintiffs are insufficient as a matter of law to preclude entry of a final judgment in favor of defendant GRANT.

Order

The Court has personal jurisdiction over the parties hereto, specifically including Sidney L. Jaffe, and jurisdiction over the subject matter of defendant GRANT's counterclaim.

The supplemental final judgment is a final judgment of the State of Florida which has been appealed and upheld by virtue of the appellate court's dismissal of the appeal as frivolous. Accordingly, the judgment is entitled to full faith and credit under Article IV, Section 1, United States Constitution, and 28 U.S.C. § 1738. Additionally, the judgment is entitled to the benefits of the doctrine of res judicata not only against ACDC, MVR, and RM, but also those in privity with them. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 n. 6 (1982); *Dudley v. Smith*, 504 F.2d 979, 982-83 (5th Cir. 1974); *Moyer v. Mathas*, 458 F.2d 431, 434 (5th Cir. 1972). Because Sidney L. Jaffe was found by virtue of the court's October 15, 1982, order to be the alter ego of ACDC, MVR and RM, he was and is in privity with those

corporations for purposes of being bound by the supplemental final judgment under the principles of res judicata. *Dudley v. Smith, supra*, at 982-83. *See also, Cotton v. Federal Land Bank of Columbia*, 676 F.2d 1368, 1370 (11th Cir. 1982); *Drier v. Tarpin Oil Co.*, 522 F.2d 199, 200 (5th Cir. 1975); *Hyman v. Regenstein*, 258 F.2d 502, 511-12 (5th Cir.) *cert. den.* 359 U.S. 913 (1959).

Plaintiffs' first argument that the supplemental final judgment was not an adjudication on the merits is based solely on their contention that an "adjudication on the merits" requires for res judicata purposes that there be a "trial on the merits." This argument is unsupported by case law, is directly contradicted by all applicable case law and is frivolous. *See, Last Chance Milling Co. v. Tyler Mining Co.*, 157 U.S. 683, 691-92 (1895); *Moyer v. Mathas, supra*, at 434; *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 332 F.2d 135 (5th Cir.) *cert. den.* 379 U.S. 915 (1964); *Jackson v. Hayakawa*, 605 F.2d 1121, 1125, n.3 & 4 (9th Cir.) *cert. den.* 445 U.S. 952 (1980); *Mayer v. Distel Tool & Machine Co.*, 556 F.2d 798 (6th Cir. 1977). Plaintiffs' contention that the supplemental final judgment is unenforceable because there was no "trial on the merits" is particularly disingenuous in view of the fact that it was the plaintiff corporations' own misconduct in the state court action which prevented any trial on the merits and caused the entry of the $3 million judgment against them.

Plaintiffs' second argument is equally frivolous. Plaintiffs do not and cannot contend that defendant GRANT has attempted to introduce into evidence in this case the statements deemed admitted in the *Barbara Raymond* case. Defendant GRANT has sought in this case to enforce the Supplemental Final Judgment which was rendered on the merits based upon the *only* evidence before the state court as to the amounts of money collected by ACDC, MVR and RM from the contract vendees of CSEL. That judgment is entitled to full faith and credit and is res judicata for the reasons stated above, and Rule 1.370(b), *Florida Rules of Civil Procedure*, and Rule 36(b), *Federal Rules of Civil Procedure*, have no applicability whatsoever to defendant GRANT's motion for final judgment.

Plaintiffs' third defense to defendant GRANT's pending motion is also without merit. In the first place, the defense as set forth in their memorandum in opposition to motion for final judgment constitutes an attempt by plaintiffs to resurrect the allegations of paragraphs 16, 20 through 30, and 49 of their amended complaint which they asserted as an affirmative defense to defendant GRANT's counterclaim in their Reply to Counterclaim served October 22, 1981. This Court's order of July 14, 1982, granting plaintiffs' motion to dismiss as to defendant GRANT also enjoined plaintiffs from "any further prosecution of the subject matter hereof as to defendant Grant" until the Court determined and plaintiffs paid defendant GRANT's attorneys fees and costs incurred in defending this action. Since plaintiffs have not paid the attorneys fees awarded to defendant GRANT by the Court, they are barred from asserting the subject matter of their complaint as a defense against defendant GRANT's counterclaim. Moreover, the Court's order of October 14, 1982, specifically struck all of plaintiff's defenses including this defense.

Plaintiffs' third defense to defendant GRANT's motion was also raised unsuccessfully by plaintiffs before both the trial court and the appellate court in *Barbara Raymond* in both interlocutory motions and appellate proceedings which were all resolved against plaintiffs. ACEDC, MVR and RM also raised the exact same argument in opposition of defendant GRANT's motion for entry of the $3 million judgment and in the appeal of that judgment which was dismissed by the Florida appellate court as frivolous. ACDC, MVR and RM also made the same argument in an adversary complaint filed against defendant GRANT in the bankruptcy court seeking removal of defendant GRANT as trustee for CSEL. That adversary proceeding was dismissed with prejudice as a result of Sidney L. Jaffe's failure to appear to be deposed pursuant to notice and an order compelling discovery by the bankruptcy court. In their memorandum in opposition to motion for final judgment, plaintiffs contended that "the jurisdictional issue has never been fully litigated." Plaintiffs' memorandum, p.4. For the reasons stated above, that contention is false. Having unsuccessfully asserted this argument before the state trial and appellate courts and the bankruptcy

court, plaintiffs are barred by the doctrine of res judicata from relitigating that issue in this action.

Finally, plaintiffs' contention that the Court should nc give full faith and credit and res judicata effect to the supplemental final judgment because it is premised upon the final default judgment which was predicated on the prior order striking the pleadings of and entering a default against ACDC, MVR, and RM for their violation of two previous orders which were purportedly void because the court lacked subject matter jurisdiction to enter the two previous orders is simply an attempt to extend beyond all rational bounds the legal principle that a judgment entered without subject matter jurisdiction is void and may be subject to collateral attack. The undisputed fact is that the *Barbara Raymond* court had subject matter jurisdiction on March 10, 1981, when it entered the Final Default Judgment and on April 27, 1982, when it entered the Supplemental Final Judgment. Therefore, even if plaintiffs were correct and the *Barbara Raymond* court erred in relying upon the plaintiffs' failure to comply with the previous orders in entering the Final Default Judgment, that error is not a jurisdictional matter and could only have been corrected, if at all, on direct appeal. *See Parker Bros. v. Fagan*, 68 F.2d 616, 618 (5th Cir. 1934); *Malone v. Meres*, 109 S. 677, 684-89 (Fla. 1926).

The Court has also reconsidered plaintiffs' motion for partial summary judgment on the issue of damages which can be construed as asserting additional defenses to defendant GRANT's motion for final judgment. Nevertheless, the Court finds that the motion for partial summary judgment was properly denied and raises neither any genuine issues of material fact nor any matters of law sufficient to avoid entry of a final judgment for defendant GRANT.

In the first place, the issues raised by the motion for partial summary judgment constitute affirmative defenses of compromise and settlement and setoff.

The compromise and settlement defense was raised by the factual allegations of the plaintiffs' amended complaint which, as

incorporated into plaintiffs' reply to defendant GRANT's counterclaim, were stricken by the Court's order of October 14, 1982, and plaintiffs cannot resurrect those defenses on the grounds that they are challenging the *amount* of damages to which defendant GRANT is entitled under Count II of the counterclaim. Second, it is apparant from the record that the settlement agreement preceded entry of the final default judgment and the supplemental final judgment in *Barbara Raymond* and, accordingly, could have and should have been raised as defenses in that action if it was to be raised at all. Having failed to raise that defense in the *Barbara Raymond* action, plaintiffs are now barred by the doctrine of res judicata from attempting to assert it as a defense in this action. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982). Finally, despite plaintiffs' attempts to characterize the security agreement as constituting a full and complete compromise and settlement of all of the disputes between the parties, the agreement provides on its face that it was to be merely an executory accord until performed by all parties and the parties further agreed that the statute of limitations on defendant GRANT's claim against plaintiffs would be tolled during the period of performance of that agreement. Therefore, defendant GRANT was not barred by the settlement agreement from asserting, after the plaintiff corporations' breach of that settlement agreement, all claims he had to the fraudulently conveyed property. *E.g.*, *Hannah v. James A. Ryder Corp.*, 380 So.2d 507 (Fla. 3d DCA 1980).

Plaintiffs also claim the bankruptcy court had the sole jurisdiction to determine the effect of the settlement agreement. The settlement agreement does provide that MVR, RM and ACDC submit to the jurisdiction of the bankruptcy court for purpose of settling their disputes with the trustee arising out of any breach of settlement agreement and any such claim "may" be brought in the bankruptcy court. Nothing in the settlement agreement provided that the bankruptcy court would have exclusive jurisdiction over any disputes arising out of the breach of the settlement agreement and such a determination would be inconsistent with the executory accord language of the settlement agreement. Moreover, the record reflects that after entry of the final default

judgment but prior to entry of the supplemental final judgment, plaintiffs filed an action in the bankruptcy court against defendant GRANT, alleging that he breached the settlement agreement. As noted above, that action was dismissed with prejudice for the plaintiff corporations' failure--specifically the failure of Sidney L. Jaffe as president of each of the plaintiff corporations--to submit to discovery.

With respect to plaintiffs' claims that they are entitled to setoff for the value of 40 lots conveyed to defendant Grant under the settlement agreement, an alleged $45,000 paid to defendant GRANT under the settlement agreement, and for some unspecified amount based upon the subordination of the claims of ACDC and MVR in the bankruptcy court, these issues are also a matter of defense which could have and should have been raised in the State court and do not constitute a valid objections to the court's awarding damages based upon the supplemental final judgment. Additionally, these matters were never pled by plaintiffs as defenses to the counterclaim. In any event, even if they had been pled and could be properly considered in determining the damages to which defendant GRANT is entitled under Count II, the record reflects that the property for which plaintiffs claim a setoff is part of the same property which was fraudulently conveyed to plaintiffs in the first place under the fraudulent conveyances voided by the final default judgment. Accordingly, plaintiffs would be entitled to be setoff for the value of that property.

With respect to plaintiffs' claim to a setoff of $45,000, there is no evidence in the record that plaintiffs paid any money to defendant GRANT. However, defendant GRANT concedes in his memorandum that he received the $25,000 down payment under the settlement agreement. The record does reflect that plaintiffs have paid neither the contempt fines described in the supplemental final judgment nor the attorneys fees awarded to defendant GRANT by the court's order of November 11, 1982. Accordingly, to the extent that plaintiffs might be entitled to a setoff claim of $25,000 against defendant GRANT, that setoff does not diminish their liability to defendant GRANT under the supplemental final judgment.

Plaintiffs' claim that the agreement of MVR and ACDC to subordinate their claims in the bankruptcy proceeding and that that subordination had some unspecified value is defeated by the fact that the record reflects that the bankruptcy court disallowed those claims without any objection by ACDC or MVR.

Although the Court has not previously ruled on the motions to continue, abate and stay, filed by Lansing J. Roy, Esquire, on behalf of all plaintiffs, those motions do not require that the court defer ruling on defendant GRANT's motion for final judgment for several reasons. First, the only issue remaining for resolution by the Court is the amount of damages which issue is determined by the sums collected by the plaintiff *corporations*. Those corporations have no Fifth Amendment privilege which would even support let alone require the Court to stay a ruling on defendant GRANT's motion. *Bellis v. United States*, 417 U.S. 85 (1974). Second, any Fifth Amendment privilege which might have been raised by any of the parties has been waived by plaintiffs' failure to timely assert such privilege in response to defendant GRANT's discovery or even prior to the hearing on all pending discovery motions before the magistriate on September 4, 1984. *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981). Third, there has been no showing that plaintiffs would be prejudiced by the Court's ruling on the motion for final judgment which has been exhaustively briefed by the parties and has been pending for almost two years. Only if the motion had been denied would it be necessary for the Court to weigh the claimed prejudice to Sidney L. Jaffe from proceeding to trial of this case against the prejudice to defendant GRANT of staying an action which has now been pending for more than three years. Finally, it is apparent from the motions themselves that the criminal proceedings which Sidney L. Jaffe now contends require the Court to abate or stay this action have been pending since at least July 8, 1983, when the information was filed against him. There has been no explanation as to why Sidney L. Jaffe failed to promptly assert his Fifth Amendment privilege or file the pending motions to abate. *United States v. Kordell*, 397 U.S. 1 (1970).

Finally, the Court feels compelled to comment upon plaintiffs' continued failure even after the default on the liability issue was entered against them to comply with discovery requests initially served by defendant GRANT in October and November, 1981, which have been the subjects of orders compelling plaintiffs to comply with such discovery or to comply with any of defendant GRANT's discovery requests served on plaintiffs since entry of the default. Notwithstanding plaintiffs' claim in the Compliance document that they filed with the Court on the eve of the hearing to determine appropriate sanctions for plaintiffs' discovery abuses, plaintiffs have refused to submit to discovery on the key issues of this litigation and have produced no documents and answered no interrogatories since entry of the October 14, 1982, order. Most importantly, plaintiffs have continued their refusal to answer interrorgatory 25 of defendant GRANT's first set of interrogatories served on each of the plaintiffs on October 21, 1981. In that interrogatory, defendant GRANT requested that plaintiffs state the total amount of money collected by each of the plaintiff corporations from contract vendees of CSEL and the present location of all such sums. Plaintiffs first answered that interrogatory by referring to their response to defendant GRANT's request to produce in which plaintiffs objected to the production of the documents which might have contained the information necessary to answer interrogatory 25. When the Court ordered plaintiffs to answer interrogatory 25, MVR and RM answered the interrogatory by stating they had collected no money from contracted venders and ACDC answered by saying, "See printouts and summaries already produced." When defendant GRANT filed a second renewed motion for sanctions on the grounds, among others, that plaintiffs had still failed to answer interrogatory 25 or produce documents which they had been compelled to produce and after the Court had granted defendant GRANT's motion and scheduled a hearing to determine appropriate sanctions, plaintiffs served additional answers to interrogatories in which they continued to refuse to answer interrogatory 25 and instead contended that RM had delivered to the trustee records from which the total

sum collected by plaintiff could be computed. However, in the Compliance document filed simultaneously with the additional answers to interrogatories, plaintiffs admitted that they had not furnished to defendant GRANT documents for the entire period during thich they had collected monies from contract vendees of CSEI.. To this date, plaintiffs have never stated the total dollar amount they collected from contract vendees nor have they accounted to defendant GRANT for any of the proceeds of their collection efforts, and there is absolutely no evidence in the record from which the Court could calculate any amount of damages other than the $3 million amount stated in the supplemental final judgment. If plaintiffs seriously contested the fact that they collected less that $3 million, the obvious method of proving that fact would be to state the amount of money they had, in fact, collected, and produce the documents which would establish that fact. Plaintiffs have done neither and the Court can only conclude that they have never had any intention of either accounting to defendant GRANT as they are obligated to do by the Final Default Judgment and this Court's Order of October 14, 1982, and that they have willfully and intentionally refused to comply with their discovery obligation in this action in an effort to frustrate, hinder and delay the Court from entering a final judgment.

Based upon the facts contained in the record and the issues raised by the parties, defendant GRANT is entitled to a judgment as a matter of law in the amount of $3 million, plus interest from the date of the supplemental final judgment at the rate of 12% per annum pursuant to Section 55.03, *Fla. Stat.* Accordingly, it is

ORDERED AND ADJUDGED:

1. Defendant GRANT's motion for final judgment is GRANTED.

2. The Court will enter a separate judgment pursuant to this Order.

DONE AND ORDERED in Chambers at Jacksonville, Florida this 2 Day of October, 1984.

/S/JOHN H. MOORE II

UNITED STATES DISTRICT JUDGE

Copies to:

All counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SIDNEY L. JAFFE, et al.,

PLAINTIFFS,

— vs. —

E. L. EASTMOORE, et al.,

Defendants.

No. 81-427-Civ-J-JHM

ORDER

By Order entered on August 11, 1982, the Court granted Defendant Grant's Second Renewed Motion for Sanctions because of Plaintiffs' flagrant and continued failure to comply with discovery requests and Court orders. Grant's Motion sought as sanctions the striking of Plaintiffs' answer and defenses to Defendant Grant's counterclaim and the payment by Plaintiffs of the attorney's fees incurred by Grant in defending this action. While not ruling out the possibilty that those sanctions would be imposed, the court determined that due to the severity of the sanctions suggested by Grant, a hearing should be held to give Plaintiffs an opportunity to be heard on the question of the sanctions to be imposed. That hearing was held on October 8, 1982. After hearing argument of counsel, the Court finds that Plaintiffs have willfully and in bad faith failed to comply with discovery requests and Court orders compelling discovery and that the sanctions sought by Grant should be imposed.

The United States Supreme Court and the Court of Appeals for the Fifth Circuit have recognized that willful and callous disregard of Court orders concerning discovery warrant the ultimate sanctions provided for in Rule 37(b)(2), *Fed. R. Civ. P. National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Phillips v. Ins. Co. of N. America*, 633 F.2d

1165 (5th Cir. 1981); *Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379 (5th Cir. 1976).

In its Orders of July 14, 1982, and August 11, 1982, the Court recognized that the Plaintiffs' conduct throughout the course of this litigation has been motivated by bad faith and has been characterized by dilatory techniques designed to prejudice the Defendants' efforts to prepare their defenses to the Plaintiffs' claims against them. Those techniques have also been used to thwart Defendant Grant's efforts to conduct discovery concerning this counterclaim against the Plaintiffs. For example, on February 19, 1982, the Court entered an Order compelling Plaintiffs to comply with Defendant's request for production of documents and compelling Plaintiffs to answer interrogatories. Despite the Court's Order, Plaintiffs refused to answer some of the interrogatories, provided incomplete and evasive answers to other interrogatories, and failed to produce some of the documents requested. On March 16, 1982, the Court entered an Order compelling Plaintiffs to produce, within 20 days, certain tax returns that had been requested by Defendants. Rather than produce the returns, Plaintiffs moved for an enlargement of time. The Motion was granted by the Court on April 26, 1982, and Plaintiffs were given until April 30, 1982 to produce the returns. Some of the returns were produced by Plaintiffs *after* the April 30, 1982, deadline and those were incomplete; some of the returns requested were not produced at all. The foregoing examples are not exhaustive of the Plaintiffs' improper conduct with respect to discovery in this case. Moreover, evidence of intentional misconduct by Plaintiffs has been brought to the Court's attention. Specifically, Plaintiffs were requested to produce computer printout summary sheets to show monies collected by Plaintiffs from contract vendees of the St. Johns Riverside Estates. Plaintiffs produced the printouts, but the summary sheets were torn offf. After an Order compelling production of the summary sheets, Plaintiffs produced some of the summary sheets but not all requested.

It should be further noted that sanctions in the form of attorneys' fees have twice been imposed on Plaintiffs during the course of this litigation. On January 25, 1982, attorneys' fees were

taxed against Plaintiffs for their unjustified failure to attend scheduled depositions. Plaintiffs did not timely pay Defendants the fees imposed by the Court as sanctions and, therefore, further sanctions were imposed against Plaintiffs on February 16, 1982.

It is abundantly clear to the Court that the lesser sanctions contemplated by Rule 37, *Fed. R. Civ. P.*, are not effective in compelling Plaintiffs to conduct discovery in a timely and responsive manner. The Court has been lenient with Plaintiffs and has given them more than sufficient time to respond to the discovery requests in this action. Plaintiffs' eleventh-hour attempt (in the late afternoon of October 7, 1982) to comply with the requests for production of documents and to answer interrogatories does not rectify their prior misconduct and does not cure the prejudice Defendant Grant has incurred in conducting discovery on his counterclaim. In fact, as Grant's counsel argued at the October 8, 1982, hearing, Plaintiffs' tardy compliance with the discovery requests shows that the information requested was available to Plaintiffs and could have been produced in a timely manner. Plaintiffs did not show good cause at the hearing for the tardiness of their attempted compliance. Based on the foregoing, it is now

ORDERED AND ADJUDGED:

1. Plaintiffs' Answer and Affirmative Defenses to Defendant Grant's counterclaim are hearby stricken and a judgment by default on Defendant Grant's counterclaim is hereby entered against Plaintiffs and in favor of Defendant Grant; and

2. Defendant Grant is hereby awarded his reasonable attorneys' fees and costs incurred in connection with his Second Renewed Motion for Sanctions, said fees and costs to be paid by Plaintiffs; and

3. A hearing to determine the amount of damages due Defendant Grant on the counterclaim and the amount due Defendant Grant for attorneys' fees and costs shall be scheduled on Motion by Defendant Grant for same.

DONE AND ORDERED in Chambers at Jacksonville, Florida this 17 day of October, 1982.

/S/JOHN H. MOORE II

UNITED STATES DISTRICT JUDGE

No. 86-1033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SIDNEY L. JAFFE, MEADOW VALLEY RANCHOS INCORPORATED, RUBY MOUNTAIN CONSTRUCTION AND DEVELOPMENT CORPORATION, AND ATLANTIC COMMERCIAL DEVELOPMENT CORPORATION,

Petitioners,

v.

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORPORATION, and as Receiver,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF PARTIES

Petitioners incorrectly identified Respondent in their List of Parties. Respondent obtained the final judgment below and is a party to this proceeding only in his capacity as trustee in bankruptcy for Continental Southeast Land Corp., bankrupt. (R.2886-87)

LISTING PURSUANT TO RULE 28.1

Meadow Valley Ranchos, Inc., purports to be the parent corporation of Continental Southeast Land Corp., bankrupt.

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No. 86-1033

IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners have misstated the facts and omitted material facts throughout their Statement of the Case. Respondent Charles W. Grant, as Trustee in Bankruptcy for Continental Southeast Land Corp., bankrupt ("Trustee"), has corrected the material misstatements and omissions in the following section of the brief.

Petitioners' recitation of events preceding Jaffe's assertion of his Fifth Amendment privilege in September 1984 is not

material to either point argued by petitioners. Specifically, petitioners contend that the district court "penalized" them (Point I) or "departed from fair standards in the administration of justice" (Point II) by reconsidering and granting the Trustee's motion for final judgment *after* Jaffe sought to invoke his Fifth Amendment privilege. Accordingly, the background facts regarding events occurring prior to September 1984 are immaterial to the points argued by petitioners, and the inaccuracies as to those facts have been ignored by the Trustee.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with any decisions of this Court or other courts of appeal on the issues raised by petitioners, and neither the facts nor the law supports their claims.

Petitioners combined their argument on the first two questions presented for review. However, for purposes of clarity, the Trustee has separated his arguments on those questions.

POINT I

THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR OTHER COURTS OF APPEAL REGARDING JAFFE'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

(a) Jaffe Had No Fifth Amendment Privilege to Prevent Production of Corporate Documents

Petitioners contend that the decision below conflicts with *United States v. Doe*, 465 U.S. 605 (1984), and *Fisher v. United States*, 425 U.S. 391 (1976), because Jaffe was the alter ego of the petitioner corporations and it was "undisputed and indisputable" that Jaffe was the "only active officer" of the petitioner

corporations and the "only person who could respond" on their behalf to the Trustee's second request for production of documents. (Pet., pp.11-12, 14) Petitioners are wrong on the facts and law.

(i) *Petitioners Failed to Preserve the Issue Below*

In their initial brief below, petitioners did not assert that Jaffe could invoke the Fifth Amendment on behalf of the corporate petitioners. In his reply brief, Jaffe made only a two-paragraph statement (unsupported by any authority) that he was justified in asserting the privilege because he had been determined to be the alter ego of the petitioner corporations. (Jaffe reply brief, p.5) None of the petitioners ever contended below that Jaffe was the "only active officer" or "only person who could respond" on behalf of the petitioner corporations to the production request, and none of the petitioners ever even cited *Doe, Fisher,* or any of the circuit court decisions upon which they now rely to establish the purported conflict. Accordingly, this issue, which for the reasons stated below is subject to vigorous factual dispute, was not properly preserved below. *G. D. Searle & Co. v. Cohn,* 455 U.S. 408, 412, n.7 (1982).

(ii) *The Facts Do Not Support Petitioners' Assertion of Conflict*

The sole support for petitioners' contention that Jaffe was the only person who could respond to the corporate discovery is a sentence in a motion to withdraw filed by petitioners' then-counsel after Jaffe consented to the withdrawal on his own behalf but objected to the withdrawal on behalf of the corporations. (R.2732-36; Resp. App. A-1, ¶¶3–7) The statement was not evidentiary and was "undisputed" only because the Trustee did not oppose the motion to withdraw.

On the other hand, petitioners' sworn answers to interrogatories, signed by Jaffe in each case, stated that Atlantic Commercial had 3 equal shareholders, 3 directors, and 3 officers, including Jaffe (R.619-20, 650-51), Ruby Mountain was a wholly-owned subsidiary of Atlantic Commercial (R.634-35), and Meadow Valley had 3 directors and 3 officers, including Jaffe, and its shareholders were so numerous that rather than name them, Meadow Valley referred the Trustee to Meadow Valley's transfer agent. (R.666-67) Jaffe also filed an affidavit stating he had instructed "the staff of our companies in Toronto and Nevada" to gather requested documents for purposes of production in response to the Trustee's third motion for sanctions. (R.1576) Petitioners never sought to supplement or change their interrogatory answers, and there is no subsequent evidence in the record to controvert the sworn statements described above.

The pertinent production request as to which Jaffe purportedly exercised his individual Fifth Amendment privilege was not a subpoena *duces tecum* directed to him personally. It was a Rule 34, F.R.C.P., request for production directed to *all* petitioners. (R.1639-43) Thus, the petitioner corporations could have produced their documents through counsel pursuant to a Rule 34, F.R.C.P., response identifying the documents produced on behalf of each corporation and avoided any purported "compelled testimony" by Jaffe, individually.

(iii) *The Law Does Not Support Petitioners' Assertion of Conflict*

There are no cases upholding an individual's right to invoke his personal Fifth Amendment privilege as a shield to prevent production of corporate documents pursuant to a request for production in a civil action simply because he has been judicially determined to be the alter ego of the corporations, and petitioners cite no authority for that contention. The alter ego doctrine is based upon the use of the corporate form to mislead or

defraud third parties and not upon the fact that the corporation is controlled by one or more persons. *See Sirmons v. Arnold Lumber Co.*, 167 So.2d 588, 589 (Fla. App. 1964). The determination that one person is the alter ego of a corporation has no bearing on whether production of documents *by the corporation* would or even might constitute "compelled testimony" by that person.

The purported conflict between the decision below and *Doe* and *Fisher* does not exist. Neither case involved the assertion of the privilege by a corporate records custodian, and neither case even purported to limit, recede from or overrule the long line of Supreme Court precedent recognizing the collective entity doctrine. *See Fisher v. United States, supra,* at 411-12; *Bellis v. United States*, 417 U.S. 85, 88-91 (1974); *In re Grand Jury Subpoena Duces Tecum (Ackerman)*, 795 F.2d 904 (11th Cir. 1986).

Petitioners also cite *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3rd Cir. 1985) (*en banc*) ("*Brown*"); *In re [sic] Grand Jury Subpoena [sic] Duces Tecum*, 769 F.2d 52 (2nd Cir. 1985) ("*Two Grand Jury Subpoenae*"); and *In re Grand Jury Proceedings (Morganstern)* 747 F.2d 1098 (6th Cir. 1984), *[sic] cert. denied* 106 S.Ct. 594 (1985) ("*Morganstern*"), as circuit court decisions which conflict with the decision below. Each case is clearly distinguishable and, in fact, supports rather than conflicts with the decision below.

In *Brown*, the Third Circuit reversed a civil contempt order against the corporate custodian (and sole owner) of a corporation for refusal to obey a grand jury subpoena duces tecum addressed to him personally to bring documents "prepared by you or under your supervision." However, the court stated:

> "Records of collective entities still must be maintained, and their production can be compelled by a subpoena *duces tecum* addressed *to the entity*."

Id. at 528. (Emphasis added) *See also In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 856, 862 (8th Cir.) *cert. dism.* 107 S.Ct. 918 (1987) (distinguishing *Brown*).

In *Two Grand Jury Subpoenae*, *supra*, the Second Circuit held that the "sole operating officer" of a corporation could not use the Fifth Amendment as a shield to prevent the corporation from producing subpoenaed documents, stating:

> "There simply is *no situation* in which the Fifth Amendment would prevent a corporation from producing corporate records, for the corporation itself has no Fifth Amendment privilege."

Id. at 57. (Emphasis added)

Petitioners' reliance on the Third Circuit panel decision in *Morganstern* is erroneous. The panel decision cited by petitioners was *reversed in 1985* after *en banc* rehearing, and this Court denied certiorari from the *en banc* decision rather than the decision cited by petitioners. *In re Grand Jury Proceedings, (Morganstern)*, 771 F.2d 143 (6th Cir.), *cert. denied* 106 S.Ct. 594 (1985). The *en banc* decision unequivocally holds that *Doe* does not authorize a corporate custodian to assert his personal Fifth Amendment privilege to prevent production of corporate documents by him in his representative capacity. *Id.* at 148.

Each case upon which petitioners rely clearly limits even a hypothetical extension of *Doe* to subpoenae directed to individuals whose compliance would have a self-incriminating testimonial impact. No case has held the "production as compelled testimony" doctrine applicable to a request for production of corporate documents to which the corporation must respond through its counsel rather than through an individual corporate representative. *See Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381

(11th Cir.), *cert. denied* 106 S.Ct. 799 (1986). Accordingly, the decision below is entirely consistent and does not conflict in any respect with the decisions cited by petitioners.

(b) Petitioners Were Not Denied Due Process and Improperly Penalized for Jaffe's Assertion of his Fifth Amendment Privilege

Petitioners contend they were denied due process and penalized for Jaffe's assertion of his Fifth Amendment privilege because the district court purportedly responded to Jaffe's assertion of the privilege abusively by "prompting" and "encouraging" the Trustee to renew a motion for final judgment denied by the court the month before and then granting the motion and entering a final judgment (which petitioners erroneously analogize to "automatic dismissal" of a complaint as a sanction) rather than granting Jaffe's motion to stay[1] the case until completion of his pending criminal proceeding. (Pet., pp.8, 12–15) Petitioners assert that the decision below conflicts primarily with *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir.), *reh'g denied* 611 F.2d 1026 (5th Cir. 1980), and *dicta* from *United States v. Kordel*, 397 U.S. 1 (1970). (Pet., pp.12–15) They also argue that the courts below erred in finding that Jaffe had "waived" his Fifth Amendment privilege. (Pet., p.15) Finally, they argue that any waiver should be excused because petitioners were "deprived...of the effective assistance of counsel below." (Pet., p.16)

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[1]Petitioners make a point of arguing that "even the District Court acknowledged [that] all petitioners moved to stay discovery," citing the court's order granting the motion for final judgment. (Pet., pp.14-15) However, petitioners' counsel filed a motion to abate on behalf of Jaffe only. (R.2710-17) Although Jaffe sought to file a *pro se* motion to stay on behalf of himself and the corporations (R.2738*), he had no authority to represent the corporations. *Palazzo v. Gulf Oil Corp., supra.* The corporate petitioners sought an extension of time to produce the documents (R.2726-31), but did not seek a stay in the district court. Accordingly, the district court's reference to "all plaintiffs" in its order was simply erroneous, and the corporate petitioners did not properly preserve the separate due process claims they now seek to assert.

(i) *The Facts Do Not Support Petitioners' Assertion of Conflict*

Petitioners contend the district court responded abusively and made the statements quoted in petitioners' brief "when advised of the petitioner's [sic] assertion of the privilege." (Pet., p.8) That is not true. The court's comments were made in the context of and response to its having been advised by petitioners' counsel that Jaffe had withheld corporate records despite being advised by his counsel that he was obligated to produce them (R.2744, p.15), and that Jaffe intended to represent himself *pro se* "through the mails" but would not appear before the court. (R.2744, p.17) The court's comments were also made in the context of petitioners' having repeatedly changed counsel (R.84-86, 1339-41, 1362-65, 2732-36, 2888-89, 2932-34)[2] and the court's previous findings that petitioners had engaged in bad faith discovery tactics to delay or prevent a final resolution of the case. (R.1460–67, 1591–94, 2744, pp.22–23, 2938, pp.25–28)

The district court neither "prompted" nor "encouraged" the Trustee to renew his motion for final judgment. In fact, when the Trustee requested that the court reconsider the motion at the very beginning of the status conference (R.2744, p.2) and argued in support of his request, the court stated:

> "Now, wait a second. So you are renewing your motion for the entry of the final judgment for the amount of three million dollars?"

(R.2744, p.14)

The district court did not penalize or enter the final judgment as a sanction against petitioners nor could it have done so. The motion for final judgment was no more or less than a motion

[2]At least *three* counsel have cited improper actions or requests by petitioners as the basis for withdrawal below. (R.1339-41, 2732-36; Notice of Withdrawal of Counsel Syprett, Meshad, Resnick & Lieb, P.A., filed in appeal below on May 31, 1985)

for summary final judgment on Count II of the counterclaim on the grounds that there were no disputed issues of fact and the Trustee was entitled to judgment as a matter of law in the minimum amount of $3 million based upon the state court's supplemental final judgment and the principles of *res judicata*. (R.1650–51; App. A-22) The court simply reconsidered the Trustee's motion for final judgment and granted the motion *based upon the evidence in the record*.[3] In fact, the effect on petitioners was no different than if the court had granted the motion when it was first considered the preceding month—after Jaffe raised but did not assert the privilege but *before* he filed his motion for stay.

Petitioners' assertion that the district court failed to consider the balancing approach described in *Wehling* is also erroneous. In its order granting the motion for final judgment, the court specifically found that there had been no showing of prejudice to petitioners by the court's ruling on the motion for final judgment which had then been fully briefed and pending for more than two years. (Pet. App. A-28)

Petitioners' assertion that Jaffe did not "intentionally and knowingly" waive his Fifth Amendment privilege as found by

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[3]Although it is immaterial, the circumstances were not the same when the court granted the motion for final judgment as when it earlier denied the motion along with seven other pending motions. At the September 20, 1984, status conference, the Trustee advised the court that he was abandoning Count I and, for purposes of the motions for reconsideration and final judgment, any claim for damages in excess of $3 million under Count II to the extent that the discovery information wrongfully withheld by petitioners since 1981 might disclose that they had collected greater amounts. (R.2744, pp.2–6; *see also* Pet. App. A-19) Petitioners' argument against the motion for reconsideration confirmed that the only disputed issues in the motion for final judgment were issues of law not fact. (R.2744, pp.17–22) Although the court gave petitioners an opportunity to supplement their response to the motion for final judgment, they did not do so, and the court specifically found in its order granting final judgment that petitioners did not assert that there were any disputed issues of fact. (Pet. App. A-22) Petitioners did not argue in the Eleventh Circuit that there were disputed issues of fact under Count II which should have prevented entry of the judgment. Thus, the context in which the court granted the motion was significantly different than that in which it had earlier denied the motion, and the judgment was fully supported by the undisputed facts in the record.

the district court and Eleventh Circuit is immaterial because he was not penalized for asserting the privilege. However, petitioners' non-waiver argument is contradicted by the facts in the record. Jaffe raised—but did not invoke—his Fifth Amendment privilege in November 1981 and again in April 1984 (after all "new charges" had been filed) in response to the Trustee's discovery requests (R.539-42, 2656-57) but deliberately withheld invoking of the privilege until after the magistrate had denied all of the petitioners' other objections to discovery at the September 4, 1984, hearing. (R.2710-17, 2738*, 2946) Jaffe then sought to assert a *blanket* Fifth Amendment privilege to all interrogatories and requests for production directed to him (including an interrogatory asking for his full name and address which he disclosed on his motion asserting the privilege and subsequent *pro se* motions). (R.2738*, 2909-11) Jaffe failed to timely and properly assert his Fifth Amendment privilege and by his own tactical delay lost the benefit of the privilege.

Petitioners were not "deprived of effective assistance of counsel below"—an argument admittedly not made to the appellate court. (Pet., p.16) In actual fact, Jaffe is or purports to be a law school graduate (R.1757-58); counsel of record below included Robert Jaffe (Jaffe's attorney brother) (R.18, 544-45); and Harold Jaffe (Jaffe's attorney son) executed an affidavit in support of a motion to disqualify the Trustee's counsel and was actively involved in petitioners' incomplete document production. (R.210-11, 1588) Jaffe sought to file his own *pro se* motion asserting the Fifth Amendment privilege in the district court (R.2738*), and Jaffe and the petitioner corporations were represented by two attorneys, including a constitutional law professor at Holland Law Center, University of Florida, in their appeal below. (Pet. App. A-3) Prior to filing their petition herein, *none* of

petitioners' prior counsel ever raised the *Doe* "production as compelled testimony" argument which is the crux of their petition.

(ii) *The Law Does Not Support Petitioners' Assertion of Conflict*

The final judgment was not analogous to an "automatic dismissal" as a sanction or penalty reviewable only for abuse of discretion. It was a summary final judgment reviewable on the merits. There is no conflict with the "penalty" cases cited by petitioners.

Because petitioners' own sworn statements refute their contention that Jaffe was the only one who could respond to the corporate production request, there is no conflict with the *dicta* from *Kordel* cited by petitioners, and this case does not present an opportunity to decide the issue left unanswered in that case.

The "waiver" issue is immaterial to the decisions below because there was no privilege as to the corporate documents, petitioners were not "penalized" for Jaffe's assertion of the privilege, and neither Jaffe nor the petitioner corporations ever submitted to the discovery sought by the Trustee. Nevertheless, the facts support the findings below that Jaffe's tactical delay in asserting the privilege constituted a waiver or loss of benefit of the privilege. *See Kordel, supra* at 10, n.18; *See also Garner v. United States*, 424 U.S. 648, 654, n.8, 9, 658, n.11 (1976), and cases cited therein; *Estelle v. Williams*, 425 U.S. 501, 514-15 (1976) (Powell, J., concurring)

POINT II

THE DISPOSITION OF PETITIONERS' CLAIMS WAS CONSISTENT WITH FAIR STANDARDS IN THE ADMINISTRATION OF JUSTICE

For the reasons stated above, the facts do not support petitioners' claim that there was any departure from fair standards

in the administration of justice below, and none of the cases cited by petitioners is even remotely relevant to this case. As the Eleventh Circuit correctly observed:

> "Jaffe et al. received not only the minimum process that was due, but also a great deal more."

(Pet. App. A-16) *See also United States v. Kordel, supra* at 11.

CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully Submitted,

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Attorneys for Respondent

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, DIVISION

SIDNEY L. JAFFE, et al *Plaintiff,* vs. E. L. EASTMOORE, et al., *Defendants.*	CASE NO: 81-427-CIV-J-16

MOTION FOR WITHDRAWAL AS COUNSEL OF RECORD FOR PLAINTIFFS AND MEMORANDUM OF LAW

COMES NOW Lansing J. Roy of Lansing J. Roy, P.A. pursuant to local Rule 2.03(b) and moves the Court for an Order allowing the withdrawal of Lansing J. Roy and Lansing J. Roy, P.A. as attorney of record for Plaintiffs herein. In support of the Motion it is shown unto the Court as follows:

1. On August 11, 1982, this Court entered an Order granting a Motion For Substitution Of Counsel wherein Lansing J. Roy, Esquire, substituted for the law firm of Rice, O'Dell and Goldman as one of Plaintiffs attorneys of record.

2. In granting the Motion For Substitution Of Counsel the Court referred to the premise in law that an attorney-client relationship may always be terminated by a client with or without cause. *Fluhr vs. Roberts*, 463 F. Supp. 745 (D.C. Ky. 1979); *Potts vs. Mitchell*, 410 F. Supp. 1278 (D.C., N.C. 1976).

3. By telephone conversation on Friday, September 14, 1984, SIDNEY L. JAFFE advised Lansing J. Roy that he consented

to the withdrawal of Lansing J. Roy and Lansing J. Roy, P.A. as legal counsel for SIDNEY L. JAFFE in these proceedings.

4. SIDNEY L. JAFFE does not consent to Lansing J. Roy and Lansing J. Roy, P.A. withdrawing as legal counsel for the corporate plaintiffs. This Motion For Withdrawal requests an Order authorizing withdrawal on behalf of all parties plaintiff.

5. The undersigned is preparing and forwarding to Toronto, Canada a Stipulation For Withdrawal to be executed by SIDNEY L. JAFFE as it relates to withdrawal as counsel of record for SIDNEY L. JAFFE individually.

6. For cause to support the Motion To Withdraw as Counsel of Record for the Plaintiff corporations, the following is shown to the Court.

7. SIDNEY L. JAFFE is the only active corporate officer of the plaintiff/corporations and is the only officer that the undersigned has had any dealings with on behalf of the corporations.

8. The relationship between the undersigned and SIDNEY L. JAFFE has substantially deteriorated over the past several months to the point where the undersigned does not feel that he can continue to represent either SIDNEY L. JAFFE individually or the corporations.

9. SIDNEY L. JAFFE has made and continues to make requests for legal steps to be taken that the undersigned does not believe that he can take in good faith. The undersigned is on the horns of dilemna to the extent that the client is requesting on behalf of himself and the corporations that certain actions be taken and legal counsel determining in his own mind that he cannot take the requested actions.

10. This has led to a series of pleadings being filed by SIDNEY L. JAFFE in *propria persona*.

11. This Court by way of its Order of August 6, 1984, struck all of the pleadings filed by plaintiff, SIDNEY L. JAFFE in *propria persona* and directed the Clerk of the Court to return all further pleadings attempted to be filed by SIDNEY L. JAFFE *unless and until his counsel of record withdraws from representing him.*

12. Local Rule 2.03(b) provides that an attorney who has made a general appearance shall not thereafter abandon the case in which the appearance was made or withdraw as counsel for any party therein without leave of Court obtained after giving ten days notice to the party or clients affected thereby and to opposing counsel. The undersigned interprets that section to mean that until an Order is entered authorizing the withdrawal that the interest of the clients are to be protected.

13. The undersigned has filed at the same time that this Motion is being filed, a Motion For a Protective Order on behalf of SIDNEY L. JAFFE. This Motion For Protective Order raises Fifth Amendment rights. In addition to that motion, however, SIDNEY L. JAFFE wanted the undersigned to file a motion on behalf of SIDNEY L. JAFFE individually and the corporations asking for a "sealing Order" as a condition precedent to production of the corporate documents. The undersigned was unwilling to file such a motion on behalf of SIDNEY L. JAFFE and/or the plaintiff/corporations. The reason for that decision is that there are no facts or law to support such a motion.

14. SIDNEY L. JAFFE wanted the undersigned to advance an argument that based on the cases of *Sperry Rand Corporation vs. Rothlein*, 288 F.2d 247 (1961); *International Products Corp. vs. Koons*, 325 F.2d 403 (1963); *United States vs. United Fruit Company*, 410 F.2d 553 (1969); *In re Halkin*, 598 F.2d 188 (1979); *Weiner vs. Bach E. Halsey Stuart*, 76 F.R.D. 624 (S.D. Fla. 1983) and *Martindale vs. International Tel and Tel*, 594

F.2d 291 (2nd Cir. 1982) that this Court should enter such an order.

15. The factual basis that SIDNEY L. JAFFE proposed that I set forth in the motion and be prepared to establish to the Court is that counsel for Grant and/or Defendant Grant have provided discovery material out of this and other civil cases to Stephen L. Boyles, State Attorney, for his use in criminal prosecutions against SIDNEY L. JAFFE. SIDNEY L. JAFFE would have the undersigned allege that there was colusion [sic] between Defendant Grant and his counsel and Stephen Boyles wherein both the spirit and letter of the Federal Rules of Discovery have been violated.

16. SIDNEY L. JAFFE would have had the undersigned request the Court to condition production of any of the corporate documents on a sealing order such that the documents could not be used in any criminal proceeding. The undersigned is not aware of any law that would be applicable to the instant circumstances to support such a motion.

17. SIDNEY L. JAFFE proposes to file documents of his own in *propria persona* dealing with this issue and other issues before the Court.

18. Based on the aforestated circumstances, the undersigned can not continue to represent any of the parties plaintiff and requests the Court to enter an order authorizing withdrawal.

19. For further grounds in support of this motion, the undersigned has advised SIDNEY L. JAFFE that he is legally obligated to produce corporate documents, however, he has failed to do so.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion For Withdrawal As Counsel Of Record For

Plaintiffs And Memorandum of Law was furnished to Sidney L. Jaffe, 110 Bloor Street West, Toronto, Ontario, M5S2W7, by United States Mail and to Terrance E. Schmidt, Esquire, BLEDSOE & SCHMIDT, 2900 Independent Square, Jacksonville, Florida, 32202 on the 14th day of September, 1984 by Hand Delivery.

LANSING J. ROY, P.A.

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